76-4061.

IN THE

Supreme Court of the United States

October Term, 1976
No.

JAMES V. NAPOLI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 17, 1976

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO

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FOR THE SECOND CIRCUIT

The petitioner, James V. Napoli, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered

in this proceeding July 1, 1976, which reversed, by a vote of 2 to 1, the judgment of the United States District Court for the Eastern District of New York (Hon. Jacob Mishler, Ch. J.) dismissing two counts of an eight count indictment.* The District Court had held that the statute, 18 U.S.C. §1962, did not proscribe the conduct charged.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court, neither of which is officially reported, are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July

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* Two additional counts of the eight count indictment were dismissed without objection by the government for failure to allege essential elements. No appeal was taken from the dismissal of these counts.

1, 1976. Timely petitions for rehearing with suggestion of rehearing in banc were denied on August 19, 1976, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1).

QUESTION PRESENTED

Whether, in light of its legislative history, Title IX of the Organized Crime Control Act of 1970 (the "Act"), proscribes per se the operation of a large-scale, illegal, continuous interstate gambling business, as defined and proscribed in Title VIII of the Act (§1955) under which petitioner was also indicted and convicted.

STATUTORY PROVISIONS INVOLVED

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest

declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

STATEMENT OF THE CASE

The indictment, filed in the United States District Court for the Eastern District of New York (75 Cr. 341), insofar as here relevant, charged petitioner and 21 others with substantive and conspiratorial violations of both the anti-racketering provisions of Title IX of the Act (18 U.S.C. § 1962)* and substantive and conspiratorial violations of the antigambling provisions of Title VIII of the Act (18 U.S.C. § 1955).**

The facts alleged in support of both the Title IX and Title VIII charges are the same, namely, that numerous individuals were engaged in a large-scale, il-

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* Counts One and Two, respectively.

** Counts Three through Five and Eight, respectively.

legal, continuous interstate numbers operation.

In pretrial motion Petitioner agreed that the conduct alleged fell within the proscription of Title VIII (18 U.S.C. § 1955). However, Petitioner sought dismissal of the Title IX counts (18 U.S.C. §§ 1961 & 1962) on the ground that said conduct was not within the ambit of that Title, which was designed to prevent the harm to legitimate business by the infiltration of organized crime. Chief Judge Mishler granted the motion and dimissed Counts One and Two. On the government's appeal, the Second Circuit reversed in a per curiam opinion over the scholarly and vigorous dissent of Circuit Judge Van Graafeiland. Rehearing with suggestion for rehearing in banc was denied.

The reversal came too late to permit trial of the dismissed counts. The trial on the Title VIII (§ 1955) charges consumed over seven weeks (July 6 through August 24, 1976) and resulted in the conviction of petitioner and eight others on at least one substantive count each. Violation of § 1955 which carries a maximum sentence of five years imprisonment and/or a $20,000 fine. Although all prosecutive goals will be satisfied by this result, the government apparently intends to press the reinstated counts to trial.

As hereinafter shown, the scope of Title IX is an important question wrongly decided below. Accordingly, this Court should intervene at this point, saving not only the instant parties and the lower court the inordinate burden of an unnecessary lengthy trial, but the many others

who may be similarly affected by the enoneous decision of the Second Circuit.

REASONS FOR GRANTING THE WRIT*

1. The decision below is a radical extension of Federal criminal jurisdiction without Congressional authority.

Gambling had been an area traditionally left to state and local law enforcement until the enactment of the Organized Crime Control Act of 1970. Title VIII of the Act (18 U.S.C. § 1955) specifically outlawed large-scale, continuous, interstate gambling operations which were conducted in violation of state law. Title

* Petitioner will not burden the Court with a detailed exposition of the reasons hereinafter discussed, but will rely upon the scholarly discussion contained in the dissenting opinion of Circuit Judge Van Graafeiland in the Appendix.

IX of the Act was specifically aimed at preventing harm to legitimate commercial activity (business and unions) by infiltration of organized crime. The majority opinion below misinterpreted the word "enterprise", defined in Title IX (18 U.S.C. § 1961 (4)), to include within the Title's protection businesses which were illegitimate from their inception. By its erroneously overbroad definition, the court below has extended Federal criminal jurisdiction into virtually every criminal venture affecting interstate commerce. Since both the statutory definition of "enterprise" and the legislative history of Title IX make it abundantly clear that Congress never intended that "enterprise" extend beyond legitimate businesses or organizations, see S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969);

H.R. Rep. No. 91-1549, U.S. Code Cong. & Adm. News 4007, 4036; 116 Cong. Rec. 591-92, 602, 603, 607, 953, 35,196, 35,200, 35,201, 35,206, 35,295, 35,304, 35,319, this judicial extension of Federal criminal jurisdiction is not authorized by Congress.

The result reached by the majority below threatens "sensitive federal-state relationships and limited federal police resources and the resultant transformation of relatively minor state offenses into federal felonies by mere geographic happenstance." Dissenting opinion below, sl.op. 4637. Compare Rewis v. United States, 401 U.S. 808, 812 (1971).

The result reached by the majority below promises to expand greatly the number of federal criminal prosecutions. It would even have the absurd result

of authorizing the prosecution under Title IX, which carries a 20 year jail sentence as against Title VIII's 5 year maximum, a gambling business which is not sufficiently important to be prosecutable under Title VIII. Title VIII proscribes only major gambling businesses unlawful under state law. Congress defined major gambling operations as those which involve five or more individuals in their management and are in substantially continuous operating for more than 30 days or take in more than $2000 on any given day. However, under the majority decision below, gambling activities too unimportant to be within the reach of Title VIII could be prosecuted under the much more serious provisions of Title IX merely upon proof that their two acts and that the busi-

ness involved or had some affect upon interstate commerce.

2. The Court below erred.

The Act is a comprehensive plan designed to deal with all aspects of organized crime, both procedural and substantive. Of its twelve titles one is specifically aimed at large scale gambling (Title VIII) and another at protecting legitimate commercial activities (businesses and unions) from the dangers of infiltration by organized crime. The comprehensive nature of the Act virtually rules out any Congressional intention to proscribe gambling under two separate titles.

The statutory definition of "enterprise", when read in context and in compliance with the well-established doctrine of ejusdem generis, e.g., United

States v. Insco, 496 F.2d 204, 206 (5th Cir. 1974), leaves no doubt that the word was intentionally limited to legitimate commercial organizations.

Section 1961 (4) defines enterprise as:

> "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity".

The first part of the defintion is addressed to all of the forms in which lawful businesses can be conducted. First the definition identifies specific forms of business organizations:

> "any individual [sole proprietorship], partnership, corporation, association".

Then it includes a general catch-all, "or any other legal entity" (emphasis added). Next the definition switches from the management side of the picture to that of legitimate organized labor. Following

the word "entity" is a comma, which is followed by "_, and any union" (emphasis added). Immediately thereafter comes the concluding general catch-all "or any group of individuals associated in fact although not a legal entity" (emphasis added).

Thus, in the context used, the concluding phrase, under which the government contends petitioner was charged, has reference only to legitimate organizations of employees which are less formal in structure than chartered unions.

The legislative history of Title IX cited above leaves no doubt as to the correctness of petitioner's statutory interpretation.

The majority opinion below cited and relied upon decisions of three other circuits (Sl. Op. 4634-35.) Judge Van Graafeiland's dissent distinguished or discredited those eases. Sl. Op. 4641-42.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and majority opinion of the Second Circuit.

Respectfully submitted,

Max Wild
645 Fifth Avenue
New York, N.Y. 10022

September 17, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

FRANK ALTESE, et al.,

Defendants.

75 CR 341

Memorandum of Decision and Order

November 26, 1975

MISHLER, CH. J.

The twenty-two defendants in this action were variously indicted on eight counts relating to alleged illegal gambling operations in violation of the Organized Crime Control Act of 1970. Sixteen of the defendants[1] are charged in count one with violations of 18 U.S.C. §1962(c).[2] All of the defendants[3] are charged in count two with conspiracy under 18 U.S.C. §1962(d) to violate §1961(c). Counts three, four, and five charge sixteen of the defendants[4] with violations of 18

[1] Salvatore Annarumo, Martin Cassella, Jerry D'Avanzo, Michael DeLuca, Anthony DiMatteo, John Lotierzo, Pasquale Macchirole, Bario Mascitti, Anthony Mascuzzio, James V. Napoli, Sr., James Napoli, Jr., Henry Radziewicz, Eugene Scafidi, Joseph Simonelli, Samata Vigorito and Robert Voulo.

[2] Section 1962. Prohibited activities

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activities or collection of unlawful debt.

[3] Frank Altese, Salvatore Annarumo, Saverio Carrara, Martin Cassella, Jerry D'Avanzo, Michael DeLuca, Anthony DiMatteo, John Lotierzo, Pasquale Macchirole, Bario Mascitti, Anthony Mascuzzio, James V. Napoli, Sr., James Napoli, Jr., Frank Pinto, Carmine Pirone, Henry Radziewicz, Rocco Riccardi, Kenneth Rossi, Eugene Scafidi, Joseph Simonelli, Samata Vigorito and Robert Voulo.

[4] Count three: Salvatore Annarumo, Jerry D'Avanzo, Eugene Scafidi and (footnote 4 continued on page 2)

U.S.C. §1955, which makes a gambling business which is illegal under state law also illegal under federal law if such a business involves five or more persons and has been in substantially continuous operation for over thirty days with gross revenues of $2,000 in any single day. Four of the defendants[5] are charged in count six with violations of 18 U.S.C. §1952.[6] Count seven charges two of the defendants[7] with violation of 18 U.S.C. §1510.[8] All of the defendants[9] are charged in count eight

[4] continued:
Robert Voulo. Count four: Anthony DiMatteo, Bario Mascitti, Rocco Riccardi, Eugene Scafidi and Robert Voulo. Count five: Salvatore Annarumo, Saverio Carrara, Martin Cassella, Michael DeLuca, Anthony DiMatteo, John Lotierzo, Sr., Pasquale Macchirole, Bario Mascitti, Anthony Marcuzzio, James V. Napoli, Sr., James Napoli, Jr., Henry Radziewicz, Sabato Vigorito and Robert Voulo.

[5] Martin Cassella, Pasquale Macchirole, James V. Napoli, Sr., and Henry Radziewicz.

[6] §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[7] Pasquale Macchirole and James V. Napoli, Sr.

[8] §1510. Obstruction of criminal investigations

(a) whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United

(footnotes 8 and 9 continued on page 3)

with engaging in a conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §§1951 and 1955.

Several defendants have made motions relating to the sufficiency of the indictment, demands for bills of particulars and requests for discovery.

DISMISSAL OF THE INDICTMENT

Counts one and two of the indictment are dismissed as to all defendants. Those counts are based on alleged violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §1962. Title IX deals with the problem of infiltration of legitimate business by persons connected with organized crime. There is no allegation in this indictment concerning infiltration of legitimate businesses. It is clear from a reading of the statute and from the legislative history that Congress did not intend for §1962 to cover the type of activity charged in this indictment.

/8 continued:

States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving of such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States

/9 Supra, note 3.

The House Report on the Organized Crime Control Act of 1970 clearly indicates the narrow purpose of §1962. In a section-by-section analysis of the law the House Report states that §1962 (a), (b), and (c) "establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations." House Report No. 91-1549, 2 U.S. Code Cong. & Ad. News 4007, 4033 (1970).

The Senate Report on Title IX emphatically stated that the purpose of §1962 is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong. 1st Sess.76(1969). There is no indication in any of the legislative documents that this statute has a purpose or scope broader than that indicated above.

Illegal gambling businesses are covered by another title of the same law. Title VII, 18 U.S.C. §1955, relates specifically to the prohibition of illegal gambling operations. The activities with which the defendants are charged are covered by §1955. Indeed, counts three and four of the indictment are based on that section. A common sense reading of the legislative documents dictates a finding that Congress did not adopt two laws which cover the identical crimes.

The government cites United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), in support of its position that §1962 covers illegal gambling businesses. Cappetto was an appeal from the issuance of a default order and a contempt order and from the granting of a preliminary injunction prohibiting the defendants from engaging in further gambling activities. In order to

support its conclusion that §1962 was intended to cover actual racketeering itself, without regard to any infiltration of legitimate businesses, the court erroneously cited legislative language which was intended to explain §1955, not §1962. 502 F.2d at 1358.

As the only other support for its position the Seventh Circuit cited a Second Circuit case, United States v. Parness, 503 F. 2d 430 (2d Cir. 1974). as authority for a broad definition of "enterprise" as used in §1962. Parness merely held that "enterprise" should be construed to include foreign as well as domestic businesses. 503 F. 2d at 439. That case did not consider whether "enterprise," as used in §1962, includes illegal as well as legitimate business operations. This court declines to follow Cappetto.

The government cites United States v. Castellano, No. 75 CR 521 (E.D.N.Y. Nov. 11, 1975—unreported) in support of its position. That decision relied primarily on Cappetto, supra. It is the opinion of this writer that the better view was expressed in United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973), which held that §1962 "makes it unlawful to invest the proceeds of racketeering in legitimate business, and §1962(d) makes it unlawful for any person to conspire to violate any provisions of §1962." 367 F. Supp. at 549.

Contrary to the government's contention that legislative history should not be the crucial factor in interpreting this statute, the court must look to the legislative history for statutory interpretation in the absence of significant case law. See, e.g., Muniz v. Hoffman, ___ U.S. ___, 95 S.Ct. 2178, 2187 (1975); Philbrook v.

Glodgett, ___ U.S. ___, 95 S.Ct. 1893, 1898 (1975); United States v. National Marine Engineers Beneficial Assn., 294 F.2d 385, 391 (2d Cir. 1961). As already noted, the relevant legislative reports indicate conclusively that §1962 was intended to deal only with the very specific problem of infiltration of legitimate businesses by persons connected with organized crime. Therefore, counts one and two must be dismissed as to all defendants named in those counts,[10] because of a failure to allege an essential element of an offense under §1962(c); that is, the conducting of a legitimate business enterprise through a pattern of racketeering.

Defendant James V. Napoli, Sr., has moved for the dismissal of counts six and seven for failure to allege essential elements of the offenses charged. Dismissal of both counts is not opposed by the government. For the reasons set forth below, counts six and seven are dismissed as to all defendants named in those counts.

Count six alleges a violation of 18 U.S.C. §1952,[11] prohibiting interstate travel for the purpose of performing certain illegal acts and the subsequent performance of such an act. The indictment fails to allege the essential element of actual performance of an illegal act. Therefore, count six must be dismissed as to all defendants named in the count.[12]

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[10] Count one: Supra, note 1.
Count two: Supra, note 3.

[11] Supra, note 6.

[12] Supra, note 5.

Count seven charges defendants James V. Napoli, Sr., and Pasquale Macchirole with violations of 18 U.S.C. §1510,[13] which prohibits the use of intimidation and threats of force to obstruct, delay or prevent an individual from communicating with a criminal investigator. The count fails to allege that the defendants knew that the attempted communication was with a criminal investigator. Because that essential element of the offense is not pleaded, count seven must be dismissed as to James V. Napoli, Sr., and Pasquale Macchirole, the only defendants named in the count.

BILL OF PARTICULARS

Several defendants have made demands on the government for extensive bills of particulars. The government in turn has provided certain particulars to each defendant.

Rule 7(f) of the Federal Rules of Criminal Procedure permits a court to direct the filing of bills of particulars. The principal purpose of a bill of particulars is to enable the accused to prepare for trial and to prevent prejudicial surprise. "A bill of particulars is normally ordered by a trial judge . . . to supplement an indictment cast in general terms. However, a judge is not required to grant such an order. Whether a bill of particulars should be provided at all, its scope and specificity, if permitted, . . . are all matters left primarily within the discretion of the trial judge." United States v. Salazar, 485 F.2d 1272 (2d Cir. 1973).

[13] Supra, note 8.

In the present action, the counts which remain in the indictment are adequately pleaded and they satisfactorily apprise the defendants of the charges against them. The particulars voluntarily offered by the government are sufficient and the government properly refused the defendants' other demands which relate to evidentiary facts which are not the proper subject of a bill of particulars, except in instances where the evidentiary facts are necessary to enable the defendant to prepare his defense.

DISCOVERY

Several defendants have made motions for discovery. The government has complied with most of the discovery requests. Those matters which are still in dispute involve information to which the defendants are not entitled at this time.

Discovery is governed by Rule 16 of the Federal Rules of Criminal Procedure. All of the information subject to disclosure under Rule 16 has been offered to the defendants by the government, according to the papers filed with the court.

The materials requested, to which the defendants are not now entitled, relate generally to statements made to the government or the grand jury by someone other than the particular defendant requesting the statement. Unless such statements are exculpatory, they are not required to be disclosed at this stage of a criminal proceeding. Brady v. Maryland, 373 U.S. 93, 83 S.Ct. 1194 (1963).

Several defendants have moved for protective orders to prevent disclosure to third parties of material provided to individual

defendants. Such a protective order will be issued as to discoverable material concerning post conspiratorial statements.

OTHER MOTIONS

Defendant James V. Napoli, Sr., has made several additional motions, some of which are mooted by the dismissal of counts one, two, six and seven. There are several motions, however, which are appropriate for decision.

Napoli contends that the presence of special attorneys from the Department of Justice, Organized Crime Strike Force, during presentations before the grand jury violated Rule 7(d) of the Federal Rules of Criminal Procedure. Napoli concedes that the Second Circuit has recently held that the presence of government attorneys during grand jury presentations is not a violation of the secrecy requirement of Rule 6(d). In re Grand Jury Subpoena of Alphonse Persico, Docket No. 75-1020 (2d Cir. decided June 19, 1975). Accordingly, the motion to dismiss the indictment based on the alleged violations of Rule 6(d) is denied.

Another motion requests a hearing to determine the extent of improper disclosures of grand jury testimony by the government. The defendant has failed to cite authority for a dismissal of the indictment based on the type of improper disclosures alleged in movant's papers. Therefore, in the absence of a showing of any possible prejudice to the defendants, the motion for a hearing is denied.

The motion for disclosure of the names, addresses and other information concerning the individual members of the grand jury

has been previously denied by this court. However, the defendants should be provided with a list of dates on which evidence concerning this indictment was presented. Additionally, the Clerk of this Court is directed to permit inspection by the defendants of the "concurrence slip" filed with this indictment.

Defendant Napoli, Sr., has moved for a severance of his trial from that of the other defendants, and severance of the conspiracy count from the alleged substantive violations. Rule 14, F.R.Crim.P., permits the court to grant a severance if it appears that the government or defendants will be prejudiced by a joint trial. There has been no showing that the defendants will be in any way prejudiced by a joint trial on all counts. The motion for a severance is denied.

Several defendants have requested leave to make further motions as appropriate. Counsel for all parties have had sufficient time to make appropriate pre-trial motions. Leave to make further motions is denied, except as to suppression motions related to electronic surveillance.

CONCULSION

Counts one, two, six and seven of the indictment are dismissed as to all defendants named in those counts.

All motions for additional particulars are denied.

The government is directed to supply each defendant with a list of dates on which evidence was presented to the grand jury concerning this indictment and is further directed to provide each defendant with the opportunity to inspect the "concurrence slip" filed

with this indictment.

Decision on motions relating to electronic surveillance of the defendants is reserved pending a hearing prior to trial.

All other motions, including requests for leave to make further pre-trial motions, are denied, and it is

SO ORDERED.

U. S. D. J.

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 902—September Term, 1975.

(Argued April 15, 1976 Decided July 1, 1976.)

Docket No. 76-1008

United States of America,

Appellant,

v.

Frank Altese, a/k/a Frankie Feets, et al.,

Appellees.

Before:

Clark,* *Associate Justice, Ret.,*
Timbers and Van Graafeiland, *Circuit Judges.*

Appeal from a judgment of the United States District Court, Eastern District of New York, Mishler, *C.J.*
Reversed and remanded.

David G. Trager, United States Attorney,
Eastern District of New York.

David Margolis, Fred F. Barlow, Special Attorneys, Brooklyn, New York.

* Associate Justice, Retired, Supreme Court of the United States, sitting by designation.

SHIRLEY BACCUS-LOBEL, ROBERT H. PLAXICO, Attorneys, Dept. of Justice, Wash., D.C., *for Appellant.*

MAURICE BRILL, New York, New York, *for Appellee, Salvatore Annarumo.*

WILD & GOLDSTEIN, New York, New York, *for Appellee, Napoli.*

RICHARD I. ROSENKRANZ, Brooklyn, New York, *for Appellee, Jerry D'Avanzo.*

GUSTAVE H. NEWMAN, New York, New York, *for Appellee, Sabato Vigorito.*

PER CURIAM:

This is an appeal pursuant to 18 U.S.C. § 731 from an order of the District Court dismissing, prior to trial, counts one and two of an eight count indictment alleging gambling and racketeering offenses in violation of the Organized Crime Control Act of 1970, 84 Stat. 922. The indictment charged twenty two defendants in the various counts, with count one charging sixteen of them with being associated with an enterprise engaged in interstate commerce and conducting its affairs through a pattern of racketeering activity and through the collection of debts in violation of 18 U.S.C. § 1962(c);[1] all twenty two of

1 18 U.S.C. 1962 provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

the defendants were charged in count two with having conspired to violate Section 1962(c), in violation of 18 U.S.C. § 1962(d).[2] The remaining counts, none of which are involved here, charged the conduct of an illegal gambling business in violation of 18 U.S.C. § 1950, and § 1952, obstruction of justice by two defendants in violation of 18 U.S.C. § 1510 and conspiracy to violate Sections 1955 and 1952. The counts under § 1952 and § 1510, being counts six and seven, were dismissed without objection of the government for failure to allege essential elements of the offenses.

The gravamen of the two counts before us (counts one and two) is that the named defendants had conducted a large scale gambling business through a pattern of racketeering activity and the collection of unlawful debts, as defined in 18 U.S.C. § 1961(1), (5) and (6).[3]

2 18 U.S.C. 1962:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

3 Section 1961 provides:

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice, section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion),

The appellants claimed and the District Court held that Section 1962(c) applied only to a legitimate enterprise that was conducted through a pattern of racketeering activity or the collection of unlawful debts and not to an illegal gambling business. In so holding the district court held that Title IX of the Organized Crime Control Act, of which Section 18(c) is a part, "deals with the problem of infiltration of legitimate business by persons connected with organized crime" and was not designed by Congress "to cover the types of activity charged in (counts one and two) of this indictment." We disagree and reverse.

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section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; . . .

1. *The Language of the Act:*

We first note that each of the four paragraphs of Section 1962 begins with the all inclusive phrase: "It shall be unlawful for any person . . ." who has received *any* income derived from *any* pattern of racketeering activity, etc., to use *any* part of such income in the acquisition of *"any* enterprise engaged in . . . interstate or foreign commerce." (emphasis supplied). The word "any" is explicit. In addition, we note that in Section 1961 the Congress in defining the words "person" and "enterprise" again uses the word *"any"*. In the light of the continued repetition of the word "any" we cannot say that "a reading of the statute" evinces a Congressional intent to eliminate illegitimate businesses from the orbit of the Act. On the contrary we find ourselves obliged to say that Title IX in its entirety says in clear, precise and unambiguous language—the use of the word "any" [4]—that all enterprises that are conducted through a pattern of racketeering activity or collection of unlawful debts fall within the interdiction of the Act. Congress could, if it intended any other meaning, have inserted a single word of restriction. Instead it left out the word and inserted a clause providing that the provisions of Title IX "be liberally construed to effectuate its remedial purposes." 84 Stat. 947. We cannot—in the light of such language—hold that Congress did not say what it meant nor meant what it said.

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4 "Any" is defined in Webster's New International Dictionary, Second Edition, as follows: "Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that everyone is open to selection without exception; all, taken distributively; every; used especially in assertions with emphasis on unlimited scope."

2. *The Cases on Title IX:*

If the language of Title IX is not found to be so explicit as we hold it to be and we are obliged to construe the language of Title IX, we come out with the same result. As this Circuit held in *United States* v. *Parness*, 503 F. 2d 430, 439 fn. 12 (1974)[5] *cert. denied*, 419 U.S. 1105 (1974), we are obliged to construe the Act liberally. Indeed, Congress declared in the Act itself:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. 84 Stat. 943.

These new penal prohibitions, enhanced sanctions, and new remedies clearly extend to an illegitimate business as well as a legitimate one; to read the Act otherwise does not make sense since it leaves a loophole for illegitimate business to escape its coverage.

We note that three other Circuits have reached this same result.[6] *United States* v. *Cappetto*, 502 F. 2d 1351 (7th Cir. 1974) *cert denied*, 420 U.S. 925 (1975); *United States* v. *Campanale*, 518 F. 2d 352 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3397 (January 13, 1976), *United States* v. *Hawes*, 529 F. 2d 472 (5th Cir. 1976), and *United States*

5 It was held that the word "enterprise" in the Act included both foreign and domestic.

6 Two district courts have held to the contrary: *United States* v. *Amato*, 367 F. Supp. 547 (SDNY 1973) and *United States* v. *Moeller*, 402 F. Supp. 49 (D. Conn. 1975) while *United States* v. *Costellano*, 75 Cr. 51 (EDNY 1975) upheld the Act's coverage as to both illegal and legitimate enterprises.

v. *Morris*, 532 F. 2d 436 (5th Cir. 1976). We are pleased to make it a foursome.

Reversed and remanded.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

Because I believe that the majority's holding radically extends federal jurisdiction to virtually every criminal venture affecting interstate commerce, I must dissent. Although such a large scale incursion by the federal government into matters traditionally of local concern may be constitutionally permissible, I do not believe that such a step should be taken in the absence of clear Congressional direction. With all due respect to my brothers, I am unable to find such a mandate in either the statutory language or the legislative history of Title IX of the Organized Crime Control Act of 1970, 84 Stat. 922, 941-948.

The majority places great reliance on the word "any" which precedes "enterprise" in 18 U.S.C. § 1962. The significance of this word escapes me. "Enterprise" is defined in 18 U.S.C. § 1961(4). If, in fact, that definition encompasses only legitimate business or organizations, placing the word "any" before the defined phrase in § 1962 should not expand its meaning.

Section 1961(4), necessarily at the core of the controversy before us, yet curiously omitted from the majority's opinion, defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity". While the concluding language of this definition is subject to an expansive interpretation, the well established doctrine of *ejusdem generis* warns against expansively interpreting broad language which immediately follows narrow and specific terms. *United*

States v. *Insco*, 496 F.2d 204, 206 (5th Cir. 1974). To the contrary, this maxim counsels courts to construe the broad in light of the narrow. *United States* v. *Baranski*, 484 F.2d 556, 566 (7th Cir. 1973). Viewed in this manner, and keeping in mind the traditional rule resolving ambiguities in penal statutes in favor of lenity, *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Archer*, 486 F.2d 670, 680 (2d Cir. 1973),[1] the scope of § 1962 on its face, is, at best, uncertain.

Even were I to agree with the majority's facial reading of the statute, I would, nevertheless, feel duty bound to examine the legislative history to ascertain Congressional intent. In expounding a statute, we must not be guided by a single sentence or word therein. Rather, we must look to the provisions of the whole law so that we may give effect to the legislative will. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975).

A review of the legislative history of Title IX leaves no doubt that Congress never contemplated that "enterprise" as used in §§ 1961, 1962 would extend beyond legitimate businesses or organizations. *See* S.Rep. No. 91-617, 91st Cong., 1st Sess. (1969); H.R.Rep. No. 91-1549, 1970

1 Notwithstanding the mandate of Congress to liberally construe the provisions of Title IX, 84 Stat. 947, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952).

U.S. Code Cong. & Ad. News 4007, 4032-4036; Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U.Pa. L.Rev. 124, 204-206 (1975). There is nothing in the floor debates that would indicate that any member of Congress expected or desired the far reaching interpretation of Title IX postulated by the majority herein. 116 Cong. Rec. 585-586, 35,193-35,319 (1970); *United States* v. *Moeller*, 402 F.Supp. 49, 58 n.8 (D. Conn. 1975); *United States* v. *Frumento*, 405 F.Supp. 23, 29-30 (E.D.Pa. 1975); *United States* v. *Mandel*, —— F.Supp. ——, 19 Cr.L. 2032 (D.Md. March 23, 1976). Perhaps the most convincing indications of Congressional intent are contained in a lengthy and scholarly response to Title IX's critics by Senator John L. McClellan, the bill's principal sponsor. McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Lawyer 55, 140-146, 196-197 (1970). From his opening observation that "Title IX is aimed at removing organized crime from our legitimate organizations", *id.* at 141, to his conclusion that § 1961 *et seq.* offers the first major hope of eradicating the "organized criminal influence in legitimate commerce," *id.* at 146, Senator McClellan clearly recognizes the scope of his bill as limited to "racketeering infiltration of legitimate business", *id.* at 196.

While the majority's disregard of legislative intent is troublesome, it pales in the shadow of the prospective consequences of their action on sensitive federal-state relationships and limited federal police resources and the resultant transformation of relatively minor state offenses into federal felonies by mere geographic happenstance. *Rewis* v. *United States*, *supra*, 401 U.S. at 812.

The end result of the majority's expansive interpretation of § 1962(c) is to accord the word "enterprise", in-

tended by Congress to be synonymous with commercial business, parity with the term "conspiracy". Hereafter, the Government will justifiably feel free to utilize § 1962(c) to prosecute any unlawful venture engaging in, or the activities of which affect, interstate commerce where the participants therein committed any two acts of "racketeering activity". *United States* v. *Moeller, supra,* 402 F.Supp. at 59. The Government suggests that its prosecutorial efforts will be kept in check by the statute's requirements of (1) a "pattern of racketeering activity", and (2) an effect on interstate commerce. I cannot agree. Only two acts of racketeering activity are required to establish a "pattern". 18 U.S.C. § 1961(5). Moreover, § 1961(1)'s definition of racketeering activity is as broad as it is long, encompassing any murder, kidnapping, gambling, arson, robbery, bribery, extortion or narcotics transaction chargeable under any State law and punishable thereunder by more than one year's imprisonment, as well as the violation of any of a series of enumerated federal criminal statutes. The interstate commerce requirement of § 1962 is likewise unlikely to greatly confine the scope of federal law enforcement efforts. In criminal statutes containing similar requirements, a de minimis involvement with, or effect on, commerce has frequently been found sufficient. *See, e.g., United States* v. *Crowley,* 504 F.2d 992, 997-998 (7th Cir. 1974) [Hobbs Act, 18 U.S.C. § 1951]; *United States* v. *Kahn,* 472 F.2d 272, 285-286 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973) [Travel Act, 18 U.S.C. § 1952].[2]

There has been increasingly widespread concern of late about the intrusion of federal criminal law into areas traditionally within the sole purview of the states. *United States* v. *Archer, supra.* Where Congress has spearheaded

2 Our Court, however, has in recent decisions sought to stem the tide. *See United States* v. *Merolla,* 523 F.2d 51, 54-55 (2d Cir. 1975); *United States* v. *Archer,* 486 F.2d 670, 678-683 (2d Cir. 1973).

the invasion, the Courts are quite naturally bound to follow as footsoldiers. When the legislature halts its forward progress, albeit perhaps only temporarily, it is not for the judiciary to lead the charge. Yet, this is precisely what I fear we have done herein.

Appellees are alleged to have engaged in illegal gambling, concededly a racketeering activity. In so doing, they have not invested in, acquired control of, or employed the resources of any legitimate commercial concern. The "enterprise" the majority finds is the gambling operation itself, a de facto conspiracy whose sole *raison d'être* was the carrying on of criminal conduct. While Congress has recognized the desirability of federal prosecution of illegal gambling, previously a matter solely of State concern, by the passage of Title VIII of the Organized Crime Control Act of 1970, 84 Stat. 922, 936-940, 18 U.S. § 1955, it has placed strict limits on those gambling operations which warrant federal intervention. Thus, § 1955 comes into play only when the gambling business involves five or more persons and remains in substantially continuous operation for more than thirty days or grosses $2,000 in a single day. In adopting these limitations, Congress intended to confine federal criminal jurisdiction to "relatively large gambling operations". *See* McClellan, *Organized Crime Control Act, supra,* at 138. The interpretation of § 1962 adopted by my brothers effectively circumvents the criteria of Title VIII. Because racketeering activity under § 1961 includes any gambling chargeable under any State law and punishable by more than one year's imprisonmen,[3] all that need be proved in addition to the State vio-

3 Additional problems are raised by the vast disparities among the laws of the various states. Under New York law, for example, the following are gambling offenses punishable by more than one year imprisonment: (a) receiving more than $500 in a single day in connection with a lottery or policy scheme [N.Y. Penal Law § 225.10(2)(b)], and (b) possession of gambling records reflecting more than

lation is an effect on interstate commerce. The 5 man, 30 day, $2,000 requirements are therefore no longer of significance, and "mom and pop" bookmaking operations, the prosecution of which was intended by Congress to be left solely to the states by the design of Title VII, McClellan, *The Organized Crime Control Act, supra,* at 138, is instead transformed into a federal offense under Title IX.

Although the instant indictment alleges a violation of federal law [18 U.S.C. § 1955] as the racketeering activity, the ramifications of the majority's expansive interpretation of § 1962 become even more pronounced where the racketeering activity charged is a violation of State law. In *United States* v. *Moeller, supra,* for example, defendants were indicted for their role in the burning of a Shelton, Connecticut rubber plant, arson being a crime punishable by imprisonment of more than one year under Connecticut law. Utilizing the majority's reasoning, the Government defined the "enterprise" as a group of individuals associated in fact for the purpose of burning down the Shelton plant. 402 F.Supp. at 57. Arguing that § 1962(c) was designed solely to eliminate the infiltration of "legitimate" businesses, defendants moved to dismiss the indictment. The District Court agreed, and no appeal was taken from its decision. As I understand footnote 6 of the majority's opinion, *Moeller* (at least so far as it defined "enterprise") is no longer good law in this Circuit.

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five hundred chances in a lottery or policy scheme [N.Y. Penal Law § 225.20(2)]. Under Vermont law gambling offenses punishable by more than one year's imprisonment include: (a) bookmaking, second offense [13 Vt. Stat. Ann. §§ 2151(1), 2052], and (b) the stimulating or depressing of race horses by the administration of drugs [13 Vt. Stat. Ann. § 2153]. In Connecticut almost no gambling offenses are subject to penalties greater than one year [Conn. Gen. Stat. Ann. §§ 53-278b, c, d, e, f].

Application of the Court's holding today to the facts in *Moeller* illustrates the far-reaching effect of our expansive interpretation of "enterprise". Without a clear and precise direction from Congress, we have created a statute making it a federal felony for any group, association or conspiracy to violate any state's murder, kidnapping, gambling, arson, robbery, bribery, extortion or narcotics statutes in any manner which utilizes or affects interstate commerce. The disruptive effect of our holding on federal-state relationships and on the limited enforcement and judicial resources of the federal government is every bit as great as that of the expansive interpretation of the Travel Act, 18 U.S.C. § 1952, condemned by the Supreme Court in *Rewis* v. *United States, supra. See also United States* v. *Archer, supra.*

Although the question at bar has been resolved on several occasions by the district courts of this Circuit, with varying results,[4] it is a matter of first impression in this Court. Accordingly, the majority turns for guidance to decisions of the Fifth, Seventh and Ninth Circuits. With all due respect to my brothers, I believe that their reliance is misplaced.

In *United States* v. *Campanale,* 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3397 (Jan. 13, 1976), the Ninth Circuit held only that § 1962 applied to "business enterprises", however small. There was not the slightest hint that the business involved, Pronto Loading and Unloading Company, was not a legitimate commercial concern. Neither was there any language to suggest that the Ninth Circuit would have upheld the conviction regardless of the legitimacy of the enterprise.

In *United States* v. *Cappetto,* 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), the Seventh Circuit held that § 1962 applied to gambling enterprises,

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4 See footnote 6 of the majority's opinion.

legitimate or not. Quite aside from the fact that *Cappetto* was a civil, not criminal, action and, therefore, did not bring into play the canon of lenity concerning the ambit of ambiguous criminal statutes, *Rewis* v. *United States*, supra, 401 U.S. at 812; *Bell* v. *United States*, 349 U.S. 81, 83 (1955), I believe that the opinion therein is unable to withstand careful scrutiny. Appellants in *Cappetto* contended, as is argued herein, that Congress' purpose in enacting § 1962 was to protect "legitimate business" against infiltration and not to prohibit racketeering itself. The Seventh Circuit rejected this argument, concluding that "both the statutory language and the legislative history . . . support the government's contrary interpretation of the Act." 502 F.2d at 1358. While conceding that one of Congress' targets was "the infiltration of legitimate organizations by organized crime", Sen.Rep. 91-617, *supra*, p. 80 (1969), and that § 1962(a) was aimed at that target, the Court went on to conclude that Congress also intended to prohibit "any pattern of racketeering activity in or affecting commerce" and that §§ 1962(b) and (c) were aimed at that target.[5] In support of this argument, *Cappetto's* sole authority was our Circuit's decision in *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), a case that held simply that the term "enterprise" encompassed foreign as well as domestic corporations. To bolster its contention that Congress intended to include illegal gambling businesses within the definition of "enterprise", the *Cappetto* court turned to the Senate Committee Report on the Organized Crime Control Act. In so doing, however, it inadvertently relied

5 I find it somewhat difficult to comprehend how subsections (b) and (c) can conjure up a different meaning of "enterprise" than subsection (a) since both are derived from the identical definition contained in § 1961(4). *See* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U.Pa. L. Rev. 192, 201-202 (1975).

on language relating to § 1955 (the gambling statute). The quoted language was clearly never intended to be applied to §§ 1961 or 1962. *United States* v. *Moeller*, *supra*, 402 F.Supp. at 60; Comment, *Infiltration of Legitimate Business*, *supra*, at 202-203.

The most recent pronouncements on the scope of §1962 come from the Fifth Circuit. *United States* v. *Hawes*, 529 F.2d 472, 479 (5th Cir. 1976); *United States* v. *Morris*, 532 F.2d 436, 441-442 (5th Cir. 1976). *Hawes* unquestionably follows *Cappetto* in holding that enterprise means more than legitimate businesses. It is worth noting, nevertheless, that the enterprise at issue in *Hawes*, Peach State Distributing Co., was engaged in the legitimate manufacture, sale, repair and leasing of jukeboxes and penny arcade amusements in addition to its illegal gambling operations. 529 F.2d at 476. Clearly, therefore, it fell within the ambit of those activities that Congress was trying to combat, to wit, the utilization of a legitimate business as a front for racketeering activity. In *Morris*, however, the Fifth Circuit went further and applied its expansive reading of enterprise to encompass an informal group of card players "associated in fact" for the sole purpose of participating in rigged card games designed to defraud unsuspecting visitors to Nevada. 532 F.2d at 442. Concededly, therefore, the Fifth Circuit now regards § 1962 as prohibiting racketeering activity *per se* so long as the requisite effect on commerce can be found. I am confident that Congress never intended such a result.

For all of the preceding reasons, I would decline to fall in line behind the Fifth and Seventh Circuits[6] and would affirm Chief Judge Mishler's dismissal of counts one and two of the indictment.

6 As previously indicated, I do not believe that the Ninth Circuit has to date expressed its views on the matter at issue.

CORRECTED COPY

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of August , one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK
Associate Justice,
HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges,

UNITED STATES OF AMERICA,
Plainitff-Appellant,

v.

FRANK ALTESE, a/k/a Frankie Feets, SALVATORE ANNARUMO, SAVERIO CARRARA, a/k/a Sammy Smach and Sammy, MARTIN CASSELLA, a/k/a Motts, JERRY D'AVANZO, MICHAEL DE LUCA, a/k/a Mikey Junior, ANTHONY DI MATTEO, a/k/a Apples, JOHN LOTTERZO, SR. a/k/a Mixed-up Junior, PASQUALE MACCHIROLE, a/k/a Patty Mack, BARIO MASCITTI, a/k/a Bari, ANTHONY MASCUZZIO, JAMES V. NAPOLI,SR., a/k/a Jimmy Map, JAMES NAPOLI JR., a/k/a Junior and Lefty, FRANK PINTO, CARMINE PIRONE, HENRY RADZIEWICZ, ROCCO RICCARDI, a/k/a Rocky, KENNETH ROSSI, EUGENE SCAFIDI, a/k/a Bo and Luigi, JOSEPH SIMONELLY, a/k/a Joe Black, SABATO VIGORITO, a/k/a Sal, ROBERT VOULO, a/k/a the Kid,
Defendants-Appellees.

Docket No. 76-1008

A petition for a rehearing having been filed herein

by counsel for Salvatore Annarumo, in which all of the effected appellees join with him

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

CORRECTED COPY

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of August , one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK,
Associate Justice,
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANK ALTESE, a/k/a Frankie Feets, SALVATORE ANNARUMOL SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MARTIN CASSELLA, a/k/a Motts, JERRY D'AVANZO, MICHAEL DE LUCA, a/k/a Mikey Junior, ANTHONY DI MATTEO, a/k/a Apples, JOHN LOTTERZO, SR., a/k/a Mixed-up Junior, Pasquale MACCHIROLE a/k/a Patty Mack, BARIO MASCITTI, a/k/a Bari, ANTHONY MASCUZZIO, JAMES V. NAPOLI, SR.,a/k/a Jimmy Map, JAMES NAPOLI, JR., a/k/a Junior and Lefty, FRANK PINTO, CARMINE PIRONE, HENRY RADZIEWICZ, ROCCO RICCARDI,a/k/a Rocky, KENNETH ROSSI, EUGENE SCAFIDI, a/k/a Bo and Luigi JOSEPH SIMONELLY a/k/a Joe Black. SABATO VIGORITO, a/k/a Sal, ROBERT VOULO, a/k/a the Kid,
Defendants-Appellees.

Docket No. 76-1008

A petition for a rehearing having been filed herein

by counsel for Sabato Vigorito on behalf of the defendants-appellees

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

No. 76-406

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES V. NAPOLI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT H. PLAXICO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-406

JAMES V. NAPOLI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-12 to A-26) is reported at 542 F. 2d 104. The opinion of the district court (Pet. App. A-1 to A-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976, and a petition for rehearing was denied on August 19, 1976 (Pet. App. A-28). The petition for a writ of certiorari was filed on September 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 1962(c), which prohibits participation in an interstate enterprise conducted through a

pattern of racketeering activity, applies to illegal as well as to legitimate businesses.

STATEMENT

An indictment returned in May 1975 in the United States District Court for the Eastern District of New York charged petitioner and a number of co-defendants with participating in an interstate enterprise (a gambling business) that conducted its affairs through a pattern of racketeering activity and through collection of debts, in violation of 18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d).[1] Prior to trial, petitioner moved to dismiss these counts on the ground that Section 1962 applied only to legitimate businesses conducted through racketeering methods and not to illegal businesses such as the gambling enterprise petitioner was charged with managing. The district court granted the motion (Pet. App. A-1 to A-11), but its order was reversed by the court of appeals, one judge dissenting (Pet. App. A-12 to A-26).[2]

ARGUMENT

1. The petition for a writ of certiorari in this case should be denied as premature. Since the judgment of the court of appeals requires that the charges against petitioner under 18 U.S.C. 1962 proceed to trial, review of petitioner's contentions at this stage would be inappropriate.

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[1]Petitioner was also charged with conducting an illegal gambling business (18 U.S.C. 1955), use of interstate facilities to promote an illegal activity (18 U.S.C. 1952), obstruction of justice (18 U.S.C. 1510), and conspiracy to commit those crimes (18 U.S.C. 371).

[2]Petitioner was subsequently convicted in July 1976 of the charge, contained in the May 1975 indictment, of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. His appeal is presently pending in the Second Circuit.

Cobbledick v. *United States,* 309 U.S. 323. If petitioner is acquitted at trial, his legal claims would be mooted. If, on the other hand, petitioner is ultimately convicted, he will thereafter have an adequate opportunity to seek review in this Court of the court of appeals' interpretation of the statute. See, *e.g., Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 257-258.

2. In any event, petitioner's contention that Section 1962(c) applies only to legitimate businesses operated by corrupt methods is incorrect. On its face the statue broadly covers "any person" who is associated with "*any enterprise*" (emphasis added) that affects interstate commerce and is conducted "through a pattern of racketeering activity or collection of unlawful debt."[3] Similarly, "enterprise" is defined in 18 U.S.C. 1961(4) to include, without qualification, "*any individual,* partnership, corporation, association, or other legal entity, and any union *or group of individuals associated in fact* although not a legal entity" (emphasis added). In view of this unambiguous language, the courts of appeals have uniformly rejected attempts such as petitioner's to exclude businesses engaged in illegal ventures from the reach of Section 1962(c). See, *e.g., United States* v. *Cappetto,* 502 F. 2d 1351 (C.A. 7), certiorari denied, 420 U.S. 925; *United States* v. *Hawes,* 529 F. 2d 472 (C.A. 5); *United States* v. *Morris,* 532 F. 2d 436 (C.A. 5).[4]

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[3]"Racketeering activity" is defined in 18 U.S.C. 1961(1) as any act constituting certain enumerated state or federal offenses, and "pattern of racketeering activity" is defined in Section 1961(5) as consisting of two or more acts of racketeering activity.

[4]The pervasive language of Section 1962 was not inadvertent, but rather evinces a conscious legislative effort to provide a comprehensive scheme to ensnare a wide variety of major criminal activity. See *Iannelli* v. *United States,* 420 U.S. 770, 786. Thus, numerous

Although petitioner correctly adverts (Pet. 12-13) to various portions of the legislative history of Title IX that evidence Congress' intent to prevent the infiltration of normal business channels by organized crime, the recognition of this particular congressional purpose does not lead to the conclusion that Section 1962(c) was designed to apply *only* to legitimate businesses. While protection of lawful business enterprises from infiltration undoubtedly was a primary motivation for the enactment of Title IX, Congress also expressly found that organized crime received most of its financial resources from illicit activities.[5] By providing effective enforcement tools to prohibit the functioning of large-scale illegitimate enterprises, Congress sought to deny participants in such enterprises the source of income used to invest in legitimate businesses. Indeed, it would be anomalous to argue that, in drafting an apparently unrestricted definition of "enterprise," Congress did not intend to attack the source of organized crime's investment in legitimate business establishments as well as instances of actual infiltration. It is therefore not surprising that, in describing the coverage

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provisions of Title IX of the Organized Crime Control Act of 1970, 84 Stat. 941 *et seq.*, restrict or prohibit the acquisition, maintenance, or conduct of "any enterprise" through a pattern of racketeering activity. As this Court noted in *Iannelli* (*id.* at 789), the Act "is a carefully crafted piece of legislation," and efforts to impose narrowing constructions on the various sections of Title IX have proven unsuccessful. See, *e.g.*, *United States* v. *Parness*, 503 F. 2d 430 (C.A. 2), certiorari denied, 419 U.S. 1105 (contention that term "any enterprise" in Section 1962(b) excludes foreign enterprises); *United States* v. *Campanale*, 518 F. 2d 352, 364 (C.A. 9), certiorari denied *sub nom. Grancich* v. *United States*, 423 U.S. 1050 (contention that term "any enterprise" excludes small business enterprises).

[5]See, *e.g.*, Section 1 of the Organized Crime Control Act of 1970, 84 Stat. 922-923; 116 Cong. Rec. 586 (1970) (remarks of Senator McClellan).

of Title IX, the legislative reports did not purport to limit Section 1962 solely to legitimate business enterprises carried on by means of racketeering (S. Rep. No. 91-617, 91st Cong., 1st Sess. 34 (1969)):

> This title creates a new chapter in title 18, entitled "Racketeer Influenced and Corrupt Organizations," which contains a threefold standard (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce, (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity."[6]

Relying on *Rewis* v. *United States*, 401 U.S. 808, petitioner nonetheless argues (Pet. 13-15) that the interpretation of Section 1962(c) adopted by the court below threatens an unwarranted expansion of federal criminal jurisdiction. Before a person may be convicted under this statute, however, it must be established that he was engaged in significant and recurring criminal activity, *i.e.*, the enterprise involved must have been conducted through a "pattern of racketeering activity," which requires proof of the commission of at least two of the serious offenses listed in Section 1961(1), and the enterprise involved must

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[6]See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 35 (1970). See also S. Rep. No. 91-617, *supra*, at 81, which specifically cites a case involving an injunction action brought against an illegal enterprise, namely a gambling house (*Respass & c.* v. *Commonwealth ex rel. Attorney General*, 131 Ky. 807, 812-813, 115 S.W. 1131, 1132), as an example of the utility of civil remedies available under 18 U.S.C. 1964. It is also significant that the catchline of Title IX in the United States Code is "Racketeer Influenced *and* Corrupt Organizations" (emphasis added).

have been engaged in or its activities must have affected interstate commerce.[7]

Furthermore, to the extent that Title IX represents an enlargement of federal criminal jurisdiction, that result was carefully considered by Congress, which clearly defined the terms "enterprise" and "pattern of racketeering activity" in an expansive manner with the knowledge that numerous activities previously the exclusive concern of the States would thereafter constitute federal offenses.[8] The rationale for the passage of the Organized Crime Control Act was that the States were often incapable of dealing effectively with organized criminal activities whose scope exceeded the boundaries of a single jurisdiction. Unlike in *Rewis*, where the legislative history was devoid of any indication that Congress intended to cover the conduct engaged in by the defendants (401 U.S. at 811-812), the construction given Section 1962 by the court of appeals in this case is fully in accord with this congressional purpose, and petitioner's conduct was unquestionably

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[7]The Second Circuit has enforced this requirement with particular strictness. See, *e.g.*, *United States* v. *Merolla*, 523 F. 2d 51; *United States* v. *Archer*, 486 F. 2d 670.

[8]The legislative history indicates that Congress restricted the statutory language when it feared that an overbroad definition would intrude unnecessarily into areas primarily of state concern. As originally proposed, for example, Section 1961 defined racketeering activity in regard to state offenses as "any act involving the danger of violence of life, limb or property, indictable under State * * * law and punishable by imprisonment for more than one year" (S. 1861, 91st Cong., 1st Sess. S3859 (1969)). On recommendation of the Department of Justice, the definition was ultimately rejected because it "would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice" (S. Rep. No. 91-617, *supra*, at 121-122), and a more limited enumeration of state offenses within "racketeering activity" was adopted.

of the kind that Congress wished to prohibit.[9] The statutory interpretation urged by petitioners, however, would make the reach of Section 1962 depend not upon the substantiality, organization, or interstate character of particular racketeering activity but rather upon the type of enterprise utilized to achieve the unlawful goals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.

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[9]Contrary to petitioner's assertion (Pet. 14), there is nothing anomalous about the fact that a defendant engaged in interstate gambling activities may be chargeable under both Section 1962(c) and 18 U.S.C. 1955. This clearly was contemplated by Congress when it included violations of Section 1955 within the definition of racketeering activity in 18 U.S.C. 1961.

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